IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No.

RUDOLPH AND CHARLES KUDILE, CO-PARTNERS DOING BUSINESS UNDER THE NAME OF KUDILE BROS. HASBROUCK HEIGHTS DAIRY,

Petitioners,

VS.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinion of the Court Below.

The opinion of the United States Circuit Court of Appeals for the Third Circuit, was filed August 21st, 1942 (Transcript, pp. 221-222), and is reported in 130 Fed. Reporter Second Series 615.

Jurisdiction.

The statutory provision sustaining jurisdiction hereof is Section 10 of the National Labor Relations Act, *supra*, and Sections 239 and 240 of the Judicial Code as amended, U. S. C. Title 28, Sections 346 and 347.

Statement of the Case.

Reference is here made to the statement of facts in the Summary Statement of the Matter Involved in the foregoing petition.

Specification of Errors to Be Urged.

The United States Circuit Court of Appeals for the Third Circuit erred in enforcing the order of the National Labor Relations Board appearing in the decree (Transcript, pp. 223-224), since petitioner is not engaged in commerce within the meaning of the National Labor Relations Act, *supra*.

Argument.

It is said that the Tenth Amendment of the federal Constitution is in the process of being repealed by judicial construction, and that the United States Supreme Court is committed to the principle that federal power under the commerce clause is unlimited in scope and may properly reach the most "intra" of intrastate commerce. It is stated that in practical effect there is no zone of business activity so local in character as to be exclusively subject to State control under powers reserved to the States by the Tenth Amendment. By way of illustration it is pointed out that there is practically no business or person today whose activities may not be said to relate in some

manner to interstate commerce. On the shelves of every drug, grocery, or clothing store or lumber yard in the United States are some goods which originally were produced in other States. In practically every such store there are some sales made every week where the goods sold presently or ultimately may be carried to other States. It is said that elevator and maintenance employees of a local office building may be "engaged in interstate commerce" because some of the office employees of tenants of the building work for a company producing goods for interstate commerce at some different and remote part of the country. Logically it is explained that if office building employees are subject to federal control so are the street car drivers, the restaurant help, the grocers and the barbers who carry, feed or shave the employees of interstate companies.

The complete answer to all this process of building possibility upon possibility is that the Tenth Amendment is still a part of the Constitution and that the interstate commerce power of the federal government is limited in scope to those activities which in a real and substantial sense directly affect interstate commerce. This has been recognized consistently in all of the decisions of the United States Supreme Court. The Supreme Court frequently has held and still holds that even though an activity may relate to or affect interstate commerce it is outside the scope of federal control if the effect is indirect or remote.

In *Schechter Corp.* v. *United States*, 295 U. S. 495 (1935), the Supreme Court invalidated the National Industrial Recovery Act by holding that the federal power did not extend to the local sale and processing of poultry which had been shipped into New York from other States. This case has never been overruled, and has been affirmed by reference in the recent Wagner Act cases. The Court stated (p. 546):

"In determining how far the federal government may go in controlling intrastate transactions upon the ground that they 'affect' inter-state commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle. * * * But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transaction which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufference of the federal government. Indeed, on such a theory, even the development of the State's commercial facilities would be subject to federal control. * * * "

Referring to the government's contention, the Court concluded (p. 549):

"The apparent implication is that the federal authority under the commerce clause should be deemed to extend to the establishment of rules to govern wages and hours in intrastate trade and industry generally throughout the country, thus overriding the authority of the States to deal with domestic problems arising from labor conditions in their internal commerce.

"It is not the province of the Court to consider the economic advantages or disadvantages of such a centralized system. It is sufficient to say that the Federal Constitution does not provide for it. Our growth and development have called for wide use of the commerce power of the federal government in

its control over the expanded activities of interstate commerce, and in protecting that commerce from burdens, interferences, and conspiracies to restrain and monopolize it. But the authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a State. * * "

In the leading case of the recent Wagner Act decisions (*Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1) (1937), the Supreme Court stated (p. 40):

It is thus apparent that the fact that the employees here concerned were engaged in production is not determinative. The question remains as to the effect upon interstate commerce of the labor practice involved. In the *Schechter* case, *supra*, we found that the effect there was so remote as to be beyond the federal power. To find 'immediacy or directness' there was to find it 'almost everywhere,' a result inconsistent with the maintenance of our federal system. * * * "

The Court's conclusion that the defendant was subject to the Wagner Act was based upon a finding of direct or substantial effect upon interstate commerce (p. 41):

In view of respondent's far-flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic. We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. Because there may be but indirect and remote effects upon interstate commerce in connection with a host of local enterprises through-

out the country, it does not follow that other industrial activities do not have such a close and intimate relation to interstate commerce as to make the presence of industrial strife a matter of the most urgent national concern. When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war? * * * "

This principle was reaffirmed in the case of *Santa Cruz Co.* v. *National Labor Relations Board,* 303 U. S. 453 (1938), (p. 466):

"It is also clear that where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention for its protection. However difficult in application, this principle is essential to the maintenance of our constitutional system. The subject of federal power is still 'commerce,' and not all commerce but commerce with foreign nations and among the several States. The expansion of enterprise has vastly increased the interests of interstate commerce but the constitutional differentiation still obtains. *Schechter Corporation* v. *United States,* 295 U. S. 495, 546. 'Activities local in their immediacy do not become interstate and national because of distant repercussions.' *Id.,* p. 554.

"To express this essential distinction, 'direct' has been contrasted with 'indirect,' and what is 'remote' or 'distant' with what is 'close and substantial.' Whatever terminology is used, the criterion is necessarily one of degree and must be so defined. * * * "

This construction as to interstate activities is consistent with the language of *N. L. R. B.* v. *Fainblatt,* 306 U. S. 601 (1939), to the effect that under the Wagner Law incidental acts in interstate commerce warranting the application of the *maxim de minimis* would be outside the scope of federal control (p. 607):

> "Examining the Act in the light of its purpose and of the circumstances in which it must be applied we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected more than that to which courts would apply the maxim de minimis. * * * "

In *Industrial Association of San Francisco, et al.* v. *United States,* 268 U. S. 64 (1925), the United States sought to enjoin the execution of an alleged conspiracy in restraint of trade and commerce in building materials, where the acts relied upon to establish the conspiracy arose from a "permit" system, the object of which was to limit sales of certain specified kinds of materials to builders who supported the plan. The case involved building plaster which was brought in from outside the State but consigned to local representatives of the manufacturers or to local dealers in San Francisco and was brought to rest in salesrooms and warehouses before being subjected to the "permits" rule. In reversing the decree of the lower court granting the injunction, the Supreme Court states (p. 78):

> "It is true * * * that plaster, in large measure produced in other states and shipped into California, was on the list; but the evidence is that the permit requirement was confined to such plaster as previously had been brought into the state and commingled with the common mass of local property, and in respect

of which, therefore, the interstate movement and the interstate commercial status had ended."

The Court distinguished the facts involved from *Swift & Co.* v. *United States,* 196 U. S. 375 (1905), *Stafford* v. *Wallace,* 258 U. S. 495 (1922), and *Binderup* v. *Pathe Exchange,* 263 U. S. 291 (1923), saying (p. 79):

> " * * * here, the delivery of the plaster to the local representative or dealer was the closing incident of the interstate movement and ended the authority of the federal government under the commerce clause of the constitution. What next was done with it, was the result of new and independent arrangements."

In *Public Utilities Commission for the State of Kansas* v. *Landon,* 249 U. S. 236 (1919), the Kansas National Gas Company owned a system of pipelines extending from points in Oklahoma and Kansas to some forty terminal towns in Kansas and Missouri, supplying many local companies with gas for ultimate sale to their customers. Permanent physical connections permitted gas to pass from the company's pipelines into the local mains. It was held that the distribution of the gas in the local mains did not constitute interstate commerce, the Supreme Court stating (p. 245):

> " * * * in no proper sense can it be said under the facts here disclosed, that sale and delivery of gas to their customers at burner-tips by the local companies operating under special franchises constituted any part of interstate commerce. The companies received supplies which had moved in such commerce and then disposed thereof at retail in due course of their own local business. * * * The thing which the receivers actually did was to deliver supplies to local companies. Exercising franchise rights, the

latter distributed and sold the commodity so obtained on their own account and paid the receivers what amounted to two-thirds of their receipts from customers. Interstate movement ended when the gas passed into local mains."

In *Atlantic Coast Line Railroad Co.* v. *Standard Oil Co. of Ky.*, 275 U. S. 257 (1927), it was held that the intrastate movement of oil which had been shipped in from other States and stored in bulk tanks and in some instances pumped directly into local tank cars did not constitute interstate commerce (p. 269):

"The important controlling fact in the present controversy, and what characterizes the nature of the commerce involved, is that the plaintiff's whole plan is to arrange deliveries of all of its oil purchases on the seaboard of Florida so that they may all be there stored for convenient distribution in the state to the 123 bulk stations and to the fuel oil plants in varying quantities according to the demand of the plaintiff's customers, and thence be distributed to subordinate centers and delivery stations, and this plan is being carried out daily * * *. The seaboard storage stations are the natural places for a change from interstate and foreign transportation to that which is intrastate, and there is nothing in the history of the whole transaction which makes them otherwise, either in intent or in fact. There is nothing to indicate that the destination of the oil is arranged for or fixed in the minds of the sellers beyond the primary seaboard storages of the plaintiff company at Tampa, * * * (etc.) Everything that is done after the oil is deposited in the storage tanks at the Tampa destinations, or at the Jacksonville destinations, is done in the distribution of the oil to serve the purposes of the plaintiff company that imported it. * * *

> "We have no hesitation in saying that the nature of the commerce in controversy in this case was intrastate."

In answer to the contention that oil products were not stored for any reasonable length of time at the seaboard storage tanks, the Court said (p. 271):

> "It may be, as suggested in the argument, that oil is being discharged into plaintiff's receptacles for its storage at the same time that it is being discharged from the storage tanks into storage tank cars for its distribution, but that is not at all inconsistent with its being a closing of an interstate or foreign transportation and a beginning of intrastate distribution for the purposes and business of the plaintiff."

In the *Schechter* case, 295 U. S. 495 (1935), previously mentioned, New York poultrymen purchased poultry which had been shipped in from other States, either through consignees or directly. It was held that the out-of-State source of the goods did not result in the defendants' slaughtering and sale of the same being constituted interstate commerce. At p. 543 the Court stated:

> "The mere fact that there may be a constant flow of commodities into a State does not mean that the flow continues after the property has arrived and has become commingled with the mass of property within the State and is there held solely for local disposition and use. So far as the poultry here in question is concerned, the flow in interstate commerce has ceased. * * * "

The Court continued, at p. 548:

> "The question of chief importance relates to the provisions of the Code as to the hours and wages of

those employed in defendants' slaughterhouse markets. It is plain that these requirements are imposed in order to govern the details of defendants' management of their local business. The persons employed in slaughtering and selling in local trade are not employed in interstate commerce. Their hours and wage have no direct relation to interstate commerce. The question of how many hours these employees should work and what they should be paid differs in no essential respect from similar questions in other local businesses which handle commodities brought into a State and there dealt in as a part of its internal commerce."

With respect to the government's argument that the effect on competitive interstate prices brought defendants within the ambit of federal control, the Court stated (p. 549):

"Similar conditions may be adduced in relation to other businesses. The argument of the Government proves too much. If the federal government may determine the wages and hours of employees in the internal commerce of a State, because of their relation to cost and prices and their indirect effect upon interstate commerce, it would seem that a similar control might be exerted over other elements of cost, also affecting prices, such as the number of employees, rents, advertising, methods of doing business, etc. All the processes of production and distribution that enter into cost could likewise be controlled. If the cost of doing an intrastate business is in itself the permitted object of federal control, the extent of the regulation of cost would be a question of discretion and not of power.

* * * * * * * *

> "We are of the opinion that the attempt through the provisions of the Code to fix the hours and wages of employees of defendants in their intrastate business was not a valid exercise of federal power."

In none of the recent Supreme Court labor cases has it been held that the mere fact of obtaining raw materials or goods from out-of-State brings an employer within the ambit of federal control. The criterion in these cases was large and substantial shipment of goods to other States, most of which (except in the *Santa Cruz* case) had originated in other States. It was held that defendant's activities directly affected that substantial flow of goods to other States. In the *Jones & Laughlin* case, 301 U. S. 1, it appeared that, after processing the finished goods, seventy-five per cent. were "pumped out to all parts of the nation." In the *Fruehauf Trailer* case, 301 U. S. 99, the Court found that more than eighty per cent. of the company's products were sold in interstate and foreign commerce.

In the *Harry Marks Clothing Company* case, 301 U. S. 58 (1937), eighty-two and eight-tenths per cent. of the finished garments were purchased by customers outside the State. In the *Santa Cruz* case, 303 U. S. 453 (1938), it was found that 1,699,000 cases of the company's products, constituting thirty-seven per cent. of its total pack, were shipped to other States. In the *Fainblatt* case, 306 U. S. 601, it was found that all of the company's products were shipped to customers in other States.

In the preceding cases, the Court found that the defendants' activities "affected" interstate commerce because their activities had to do with the beginning or the continuance of an interstate flow of goods. It was pointed out that a strike or stoppage of work at the defendants' plants would substantially and directly affect the large amount of goods which they shipped in interstate commerce.

The principle that a local business is not brought into interstate commerce by reason of the purchase of out-of-State goods is probably no better illustrated than in one of the most recent Wagner Act decisions, *Consolidated Edison Co., et al.* v. *National Labor Relations Board, et al.*, 305 U. S. 197 (1938). In that case, the Supreme Court sustained the application of the Wage-Hour Law to a large public utility in New York City, which supplied many of the instrumentalities of interstate commerce. None of its products was actually shipped across State lines. The Court held that the defendant's activities directly affected interstate commerce because of the stoppage in interstate commerce that would result if the defendant discontinued operations: "Instantly, the terminals and trains of three great interstate railroads would cease to operate; interstate communication by telegraph, telephone, and radio would stop; lights maintained as aids to navigation would go out; * * * such effects we cannot regard as indirect and remote." The Court refused to base the application of the Wagner Act to defendant's operations on the fact that it obtained great quantities of supplies from outside the State. It was stated (p. 220):

> "In the present instance we may lay on one side, as did the Circuit Court of Appeals, the mere purchases by the utilities of the supplies of oil, coal, etc., although very large, which come from without the State and are consumed in the generation and distribution of electric energy and gas."

In the lower court's decision (95 Fed. (2d) 390), which the Supreme Court affirmed on this point, it was stated (p. 393):

> " 'Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace ef-

fects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. *Id.* The question is necessarily one of degree.'

"Consistently with these principles it can scarcely be doubted that the labor disputes of a local merchant will not normally fall within the Board's jurisdiction, even though some part of his stock in trade originates outside the state or some of his local customers are engaged in interstate commerce. In such a case the closing of the merchant's store by a strike of his employees would undoubtedly affect interstate commerce, but the effects would be too remote and indirect to bring his activities within the range of federal regulation."

The facts as disclosed in the opinion of the Circuit Court (Transcript, pp. 221-222) indicate that the petitioners in the present application purchase dairy products in the State of New York, and then distribute same for final consumption in homes throughout the northern counties of the State of New Jersey. Nothing is added to the product by petitioner. The first contact therewith is at the New Jersey plant of petitioner, from which point it is distributed entirely within the State of New Jersey. Present petitioners' connection with interstate commerce is consequently no more direct than that of a restaurant which feeds passengers of interstate trains or buses, or that of an automobile parts manufacturer who makes sales to an automobile plant shipping cars over State lines, or that of a retail haberdashery establishment which sells locally, merchandise purchased from out of State manufacturers.

No reported case seems to go as far on the facts as the instant decision in the application by the Third Circuit Court of Appeals of the provisions of the National Labor

Relations Act with respect to interstate commerce. This application, if followed logically, removes all limitations heretofore fixed. The local store keeper, the small farmer, the lawyer, the baker, indeed, anyone who uses in his business, employment or profession supplies or material which have their origin or source of supply without the bounds of the State without regard to the ultimate disposition thereof is henceforth engaged in such occupation, business or profession as "affects interstate commerce." The process of federalization is thus complete.

Surely the extension of jurisdiction to the instant type of business was not within the contemplation of the Congress when the National Labor Relations Act was enacted.

Conclusion.

It is, therefore, respectfully submitted that a writ of certiorari issue so that this Honorable Court may review the judgment of the Circuit Court of Appeals for the Third Circuit and reverse the same.

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